

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 30

Docket No. AT-0752-09-0626-I-1

**Vincent E. Dowell,
Appellant,**

v.

**United States Postal Service,
Agency.**

February 5, 2010

Vincent E. Dowell, Powder Springs, Georgia, pro se.

Earl L. Cotton, Sr., Esq., Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his removal appeal as untimely filed without a showing of good cause for the delay. For the reasons set forth below, we DENY the PFR under [5 C.F.R. § 1201.115\(d\)](#), REOPEN the appeal under [5 C.F.R. § 1201.118](#), VACATE the ID, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant appealed from the agency's action removing him from the position of Mail Handler for being absent without leave. Initial Appeal File (IAF), Tab 1. He received the removal decision on March 10, 2009, and it was effective on March 21, 2009. *Id.* The appellant filed his Board appeal on May 19, 2009. *Id.* In the interim, the appellant had engaged in unsuccessful mediation of a discrimination complaint on May 14, 2009. *Id.*

¶3 The administrative judge issued an Order on Timeliness, which set forth the 30-day deadline for filing a Board appeal and the requirement to show good cause for a delay in filing. IAF, Tab 3. The Order also informed the appellant of the exception to the 30-day filing requirement under [5 C.F.R. § 1201.154\(b\)](#). *Id.* Under the regulation, an appellant who has been subject to an action that is appealable to the Board and has filed a formal discrimination complaint with the agency may file an appeal either within 30 days after receipt of a final agency decision on the complaint or after 120 days if no final decision has been issued. [5 C.F.R. § 1201.154\(b\)](#). The appellant did not respond to the Order on Timeliness. In the ID, the administrative judge dismissed the appeal as untimely, because it was filed 29 days after the expiration of the 30-day time limit for filing a Board appeal, without a showing of good cause for the filing delay. IAF, Tab 6.

¶4 The appellant has filed a PFR in which he resubmits copies of the May 14, 2009 documents that were in the record on appeal, showing that he agreed to mediate an equal employment opportunity (EEO) complaint and that the mediation was unsuccessful. Petition for Review File (PRF), Tab 1. He asserts that he filed an EEO complaint and appealed to the Board after the EEO mediation failed. *Id.* The agency has responded to the PFR. PRF, Tab 4.

ANALYSIS

¶5 The appellant's PFR does not provide new and material evidence or show an error of law or regulation by the administrative judge. Therefore, we deny the

petition under [5 C.F.R. § 1201.115](#)(d). However, we reopen the appeal on our own motion under [5 C.F.R. § 1201.118](#), vacate the initial decision, and remand the appeal for further development of the record.

¶6 When an appellant has been subjected to an action that is appealable to the Board and alleges that the action was effected in whole or in part because of discrimination on the basis of race, color, religion, sex, national origin, disability or age, he may initially file a direct Board appeal or an EEO complaint with his agency, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. See [5 U.S.C. § 7702](#)(a); *Moore v. Department of Justice*, [112 M.S.P.R. 382](#), ¶ 12 (2009); *Carter v. Department of the Navy*, [87 M.S.P.R. 373](#), ¶ 8 (2000), [29 C.F.R. § 1614.302](#)(b); [5 C.F.R. § 1201.154](#)(a)-(b).

¶7 When an individual files a Board appeal prior to filing a formal EEO complaint, the Board is his elected forum. *Social Security Administration v. Harty*, [96 M.S.P.R. 65](#), ¶ 16 (2004). The Board's decision on the merits is then appealable to the Equal Employment Opportunity Commission. [5 C.F.R. § 1201.157](#). If an appellant elects to proceed first by filing a timely formal discrimination complaint with his agency, the right to appeal to the Board does not vest until either the agency issues a final decision on the discrimination complaint or 120 days elapse from the date the discrimination complaint was filed with the agency. *Summerset v. Department of the Navy*, [100 M.S.P.R. 292](#), ¶ 8 (2005); *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 328 (1994); [5 C.F.R. § 1201.154](#)(b). If an appellant files a Board appeal prematurely after filing a formal EEO complaint, the administrative judge must dismiss the appeal without prejudice to its later refiling under 5 C.F.R. § 1201.22. *Summerset*, [100 M.S.P.R. 292](#), ¶ 8; 5 C.F.R. § 1201.154(c).

¶8 The mediation documents submitted by the appellant on appeal showed that he had initiated the agency discrimination complaint process prior to filing his Board appeal. IAF, Tab 1. However, the record does not contain evidence sufficient to establish whether the appellant filed a timely formal discrimination

complaint with the agency on his removal prior to filing his Board appeal on May 19, 2009. If he did so, his Board appeal may have been premature rather than untimely. *See Moore v. U.S. Postal Service*, [91 M.S.P.R. 277](#), ¶ 9 (2002). In that case, he is entitled to appeal to the Board and receive a *de novo* review of his removal after meeting the exhaustion requirements of [5 C.F.R. § 1201.154](#)(b). *See Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 341 (1995). If the appellant did not file a timely formal discrimination complaint with his agency, and his May 19, 2009 Board appeal constituted an election of this forum, the timeliness requirement of 5 C.F.R. § 1201.22 is applicable to his appeal. *See id.*

¶9 Because the record lacks evidence to show what forum the appellant elected, we find it necessary to remand this appeal to the regional office for further adjudication. This should begin with a determination of whether the appellant filed a formal EEO complaint; if he did so, when and whether it was timely; and whether the agency has issued a decision or 120 days have passed from the filing of the complaint. *See Augustine v. Department of Justice*, [100 M.S.P.R. 156](#), ¶¶ 10-11 (2005). On remand, the administrative judge shall require the parties to present evidence and argument regarding the election and timeliness considerations set forth above and make a determination as to whether the appellant's appeal was premature or untimely. *Id.*; *see Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980) (an ID must identify and resolve all material issues of fact and law).

ORDER

¶10 Accordingly, we remand the appeal to the regional office for further development of the record in accordance with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.